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Marriage and Divorce of Christians and New Muslims in Early Modern Ottoman Empire: Crete 1645-1670

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Abstract

This paper focuses on many interesting remarks with regard to the application of Ottoman law in Crete in the second half of the XVII century. At that time, the general principles of Ḥanafī law on marriage and divorce were followed and the Ottoman modifications stressing the judicial and sultanī authority were observed. The registration of marriage contracts is considered an important if not necessary requirement. The aim was to alleviate complications in case of divorce or death of one of the spouses. The petition to the judge to reissue a marriage contract was a practical necessity, an example of which is the order of the judge to produce the marriage contract, as proof. This does not mean though that practice was similar everywhere in the empire. Societies like the Cretan one with a long tradition of written documentation, inherited by the Venetians, was more apt to adopt Ottoman innovations on registration than towns in Anatolia.

Christians and new Muslims in Crete seem to have adapted rather rapidly to the introduction of the new judicial system. They can defend themselves successfully in court and they are aware of procedure. It is remarkable to see a Christian woman achieving the rehearing of her case through a sultanī order few years after the conquest. I cannot however but wonder about the type of legal advice and aid she had received local customs like the traditional dowry given by the wife to the husband, is thus disguised, as gift to adhere to new legal concepts. Social problems like poverty, forced conversion or second marriages, illustrate the problems the judge was faced with. Thus the ottoman judge uncertain as to whether the rapidly changing Cretan society, with the numerous converts and non-Muslims is capable of understanding fine points of Islamic law, operates as an educator reminding the litigants of their obligations.

Keywords

Ḥanafī Law; Crete; Marriage and Divorce; *Zimmi*; *Kadis* Court

Marriage and divorce of Christians during the Ottoman period has been the issue of extensive research.¹ Scholars using primarily ecclesiastical and communal records have been pointing out to a dichotomy between the prescriptions of the Orthodox Church -as expressed in synodical letters and the *nomokanon* manuals-, and the practice as detected in numerous communal records.² In areas where the Ottoman presence was long established,

¹ Jennings, R. "Divorce in the Ottoman Sharia Court of Cyprus, 1580-1640". *Studia Islamica* 78, 1993, 155-167; idem. "Women in Early 17th Century Ottoman Judicial Records: The Sharia Court of Anatolian Kayseri". *Journal of the Economic and Social History of the Orient* 18, 1975, 53-114; Ivanova, Svetla. "The Divorce between Zubaida Hatun and Esseid Osman Ağa: Women in the Eighteenth-Century Shari'a Court of Rumeli". In: *Women, the Family, and Divorce Laws in Islamic History*. Amira El Azhary Sonbol (ed.). Syracuse, Syracuse University Press, 1996; Imber, Colin. " 'Involuntary annulment' of Marriage and its Solutions in Ottoman Law". *Turcica*, 25 (1993), p. 39-73; id. "Zinâ in Ottoman Law". In: *Contributions à l'Histoire économique et sociale de l'Empire ottoman*. Jean-Louis Bacqué-Grammont; Paul Dumont (eds). Louvain, Peeters, 1983, p. 59-92; id. "Women, Marriage and Property: *Mahr* in the *Behçetü'l-Fetâvâ* of Yenişehirli 'Abdullâh". In: *Women in the Ottoman Empire: Middle Eastern Women in the Early Modern Era*. Madeline C. Zilfi (ed.). Leiden, New York, Brill, 1997, p. 81-105, Peirce, Leslie. " 'She is Trouble and I Will Divorce Her': Orality, Honor and Divorce in the Ottoman Court of 'Aintab". In: *Women in the Medieval Islamic World: Power, Patronage, Piety*. Gavin R.G. Hambly (ed.). Cambridge, Palgrave Macmillan, 1997, p. 269-301; Zarinebaf-Shahr, Fariba. "Women, Law, and Imperial Justice in Ottoman Istanbul in the Late Seventeenth Century". In: *Women, the Family, and Divorce Laws In Islamic History*. 80-95; Tucker, Judith E. *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine*. Berkeley, University of California Press, 1998; id. "Marriage and Family in Nablus, 1720-1856: Towards a History of Arab Marriage". *Journal of Family History*, XIII, 2 (1988), p. 165-179; Zilfi, Madeline C. " 'We Don't Get Along': Women and *Hul* Divorce in the Eighteenth Century". In: *Women in the Ottoman Empire: Middle Eastern Women in the Early Modern Era*. 264-296; Ze'evi, Dror. "Women in 17th-Century Jerusalem: Western and Indigenous Perspectives". *International Journal of Middle East Studies*. XXVII, 2 (1995), p. 157-173; Behar, Cem. "Neighborhood Nuptials: Islamic Personal Law and Local Customs—Marriage Records in a Mahalle of Traditional Istanbul (1864-1907)". *International Journal of Middle East Studies*, XXXVI, 2004, p. 537-559; al-Qattan, Najwan. " *Dhimmi*s in the Muslim Court: Legal Autonomy and Religious Discrimination". *International Journal of Middle East Studies*, 31 (1999), p. 429-444.

² Many have been published, but a great number is still in manuscript form. These are some of the sources I used: Gkines, Dimitrios. *Περίγραμμα Ιστορίας του Μεταβυζαντινού Δικαίου* [Historical Framework of Post Byzantine Law]. Athens, Akademia Athenon, 1966; Pantazopoulos, Nicolas I. *Κώδιξ Μητροπόλεως Σισανίου και Σιατίστης, 17^{ος}-19^{ος} αιώνας* [The Codex of the Metropolitan See of Sisanion and

local custom influenced by Islamic practices on marriage and divorce has found its way into local marital practices. Albeit impossible to follow this development in the 15th and 16th centuries due to lack of documentation, the 17th century offers many opportunities for exploration. However, until further research is conducted in the plurality of the legal options offered to Ottoman subjects and the type of legal advice they had in pursuit of 'their justice', we can only hypothesize about the importance of the 17th century as a period of legal change. Our first observation is the gradual change in the Ottoman interpretation of *Ḥanafī* law—starting from the mid-16th century. Kemalpasazade and Ebussuud, two eminent jurisconsults endeavoured to r

Siatista, Seventeenth-Nineteenth centuries]. Thessaloniki, 1974; Giannoules, N.K. *Κώδικας Τρίκης* [Trikkas Codex]. Athens, 1980; Karpathios, E. *Αρχαίον Ιεράς Μητροπόλεως Κω (Δωδεκανήσου)* [Archive of the Holy Metropolitan See of Kos (Dodecanese)]. Athens, 1958-1962, Vol. I-IV; Michaelares, P.D. *Οι δύο αρχαιότεροι κώδικες της Ι. Μ. Μυτιλήνης* ['The two earliest Codices from the Metropolitan See of Lesbos']. In: *Γραπτές πηγές στη Λέσβο. Ο πλούτος των τοπικών συλλογών* [Written Sources in Lesbos. The Wealth of Local Collections]. Mytilene, 1993, 41-46; Pelagides, E.O. *Κώδικας της Μητροπόλεως Καστοριάς, 1665-1769* [The Codex of the metropolitan See of Kastoria, 1665-1769]. Thessaloniki, 1990; Bees, N. *Τοπικά νομικά έθιμα Βυτίνης και των περιχώρων αυτής και της επαρχίας Τριπόλεως* [Local judicial customs of Bytines and its Environs and of the Tripoli Province]. In: *Πρακτικά Ακαδημίας Αθηνών* [Minutes of the Academy of Athens]. Athens, 1945, vol. xx, 68-85; Zepos, P. *Τα νομικά έθιμα της Πελοποννήσου* [The Judicial Customs of the Peloponnese]. In: *Πρακτικά Α' Διεθνούς Συνεδρίου Πελοποννησιακών Σπουδών* [Minutes of the 1st International Congress of Peloponnesian Studies]. Athens, 1976, 73-85; Tourtoglou, M.A. "Συμβολή στη Μελέτη του Μεταβυζαντινού εθιμικού Δικαίου των Κυκλάδων" [Contribution to the Study of post-Byzantine Law in Cyclades]. *EEKM* 13 (1985-1990), 245-256; Antoniadis, A. *Δικαστικές αποφάσεις από την τουρκοκρατούμενη Σκύρο* [Judicial Decisions from Syros Under the Ottoman Yoke]. In: *Αρχαίο Ευβοϊκών Μελετών* [Archive of Euboian Studies]. Athens, 1978-9, Vol. XXII, 39-62; Bizbizis, I. "Δικαστικά αποφάσεις του 17ου αιώνα εκ της νήσου Μυκόνου" [Seventeenth Century Judicial Decisions from the Island of Mykonos]. *EAIED* 7 (1957), 20-154; Tourtoglou, M.A. "Η νομολογία των κριτηρίων της Μυκόνου" [The Jurisprudence of the Mykonos Courts, Seventeenth-Nineteenth Centuries]. *EKEID* (1980-1), 27-28, 3-257; *Id.* "Η νομολογία των κριτηρίων της Νάξου" [The Jurisprudence of the Naxos Courts, Seventeenth-Nineteenth Centuries]. *Mnemosyne* 14 (1998-2000), 97-184; Athanasakis, S. "Ανέκδοτα ιστορικά Έγγραφα" [Unpublished Historical Documents]. *Filiatra* 10 (1979), 257-360; Tselikas, Ag. *Τα δικαιοπρακτικά έγγραφα των μοναστηριών Ομπλού, Χρυσοποδαριτίσσης, Αγίων Πάντων και Γηροκομείου Πατρών, 1712-1885: Διπλωματική έκδοση* [The Judicial Documents of the Monasteries Omblou, Hrysopodaritissas, Agion Panton and Home for the Aged of Patras]. Athens, 2000; Kampouroglou, D.G. *Μνημεία της Ιστορίας των Αθηνών* [Monuments of the History of Athens]. Athens, 1891-2.

econcile ottoman law, *kanun* (Arabic: *qānūn*), with Islamic law, *ṣeriat* (Arabic: *ṣarīʿah*). Their efforts initiated on land tenure and taxation and gradual extending to private law (family and torts against person and property) were aiming at unifying obscure interpretations of the *ṣeriat* and extend the jurisdiction of the Sultan and his legal agents. In the 17th century, we observe thus a rather unified system and a further bureaucratization of legal theory and practice. This development explains the expansion of the judge's jurisdiction in areas of law previously reserved for the ruler. Muslim judges, *kadīs* (Arabic *qāḍī*), found themselves increasingly engaged in court cases where both litigants were non-Muslims and had to pronounce judgment even in areas of family law—clearly in discord with ecclesiastical authority and prescriptions. By the mid-17th century, the legally educated non-Muslim subject was able to obtain the opinion of Muslim jurisconsults even on family affairs.³ Thus, we encounter a number of legal opinion, *fatwā* (Turkish *fetva*), collections of ottoman jurisconsults including chapters on marriage and divorce of infidels and even fornication among infidels. As obtaining such a legal opinion involved most of the time traveling to the capital, non-Muslims seem to consider the financial burden of this trip worthy in their legal strategy. The second hypothesis explaining the expansion of communal 'courts' in the 17th century could be related to Ottoman experimentation on taxation. As the Ottoman Empire gradually abandoned direct collection of taxes to tax farmers and the burden of taxation became communal, local community councils upgraded their traditional reconciliatory character and as their influence on the community expanded; their rulings became more binding for their members. This development was evident earlier in remote areas of the Ottoman dominion

³ Jennings, Ronald. "Zimmis (non-Muslims) in Early Seventeenth Century Ottoman Judicial Records: The Sharia Court of Anatolian Kayseri". *Journal of the Economic and Social History of the Orient*, 213 (1973), p. 251, 271, 274; *id.*, *Christians and Muslims in Ottoman Cyprus and the Mediterranean World, 1571-1640*. New York, New York University Press, 1993, p. 69, 133. Faroqhi, Suraiya. *Men of Modest Substance: House Owners and House Property in the Seventeenth Century Ankara and Kayseri*. Cambridge, Cambridge University Press, 1987, p. 154, 200-210. Gradeva, Rossitsa. "Orthodox Christians in the Kadi Courts: the Practice of the Sofia Sheriat Court, Seventeenth Century". In: *Id.*, *Rumeli under the Ottomans 15th-18th Centuries: Institutions and Communities*. Istanbul, Isis, 2004, p. 165-194, argues that Christians preferred the Ottoman court since it provided better documentation, lower fees, more favorable procedures, and a greater likelihood of enforcing its rulings.

traditionally paying their taxes in a lump sum (*maqṭūʿ*).⁴ Finally from the mid-17th century onwards and in particularly from the 18th century the Orthodox Patriarchate in Istanbul managed to extend judicial jurisdiction to orthodox laymen and pronounce judgment not only on family law but on other aspects of law apart from criminal law.

Based on these three hypothetical developments we could argue that the only legal choice the Cretans had after the partial conquest of the island in 1645 and until the final conquest of the entire island in 1669; was the Muslim judge's court. The local communities would need another century to develop as the taxation system changed after 1669, whereas the church of Crete went through many turbulent periods in their struggle against the Sinaites—who were supported by the Ottomans until almost the 1750s. These developments though do not—in any way—explain the insistence of Christians to marry and divorce in the Muslim court. As long as there is a priest in their neighbourhood family affairs should be dealt with by him. We can again only speculate as to the particular reasons for their choice. With regard to mixed marriages, though, it is apparent that the only one to be able to validate the marriage contract was the Muslim judge.

Ḥanafī/Ottoman Rules on Marriage and Divorce

Before discussing the court cases in the Resmo and Kandiye courts between 1645 and 1670 we would have to make a few remarks about the Ḥanafī/Ottoman laws on marriage and divorce. The decision to apply to the Muslim court entailed the acceptance on the part of the litigants of Islamic procedural law. The decision of the judge was final and legally binding in all courts including the ecclesiastical or communal ones. This was a source of friction between ecclesiastical authorities and ottoman dignitaries. The only deterrent the church could use was the threat of excommunication—a rather strong weapon in some cases. Marriage in Ottoman law comes into existence as the outcome of a contract whose validity is dependent on the fulfilment of certain conditions. In Ḥanafī theory, the contract is an entirely private agreement, requiring no judicial intervention or registration. In the Ottoman Empire, however, it was customary to register marriages with the judge. Ebussuud, in the 16th century, in one of his legal opinions, explained

⁴ Gerber, Haim. *State, Society, Law in Islam: Ottoman Law in Comparative Perspective*. New York, SUNY Press, 1994.

that registration is evidence of marriage in case of dispute and a tool to prevent irregular or illicit unions. The formula for the conclusion of a marriage is not fixed, but must consist of two parts; an offer from the bride's party and an acceptance from the bridegroom's.⁵ Neither the bride nor the groom needs to be present. Their guardians or agents may contract the marriage in their absence. However if the bride is an adult it does not become effective until she has given her consent. The Ḥanafī jurists stipulate that there must be two male witnesses to a contract of marriage, or else two women and one man. A third element in a valid contract is normally the permission of the woman's guardian. As a female, a mother cannot act as guardian and, in the absence of male agnates; the judge must assume the role. In strict Ḥanafī law, the omission of an element in the contract invalids the marriage and necessitates separation. In this case the Ottomans imposed the chastisement of the couple. Another condition for the validity of marriage is the equality (*kafā'ah*) of the spouses.⁶ Since descent in Islamic law is through the male line, the offspring of an unequal marriage would require their father's low status, and so shame the mother and her relatives. There was no problem if a man of high status married a lowborn woman. The second consequence of the prohibition is that a Muslim woman cannot marry a non-Muslim man, as he is her inferior with regard to religion. A Muslim man, on the other hand, can marry a non-Muslim woman. The dower (*mahr*) is a sum, which the husband must pay to the wife. It is as indispensable to the contract as it is central to the Ḥanafī theory of marriage. By the payment of the dower, the husband acquires, quite literally, the ownership of the wife's vulva, and it is this ownership, that renders sexual intercourse licit.⁷ The value of the dower is negotiable between the parties. The minimum permissible dower is ten *dirhem*, which is ten *akçe* in ottoman practice. If the contract does not specify the amount, the bride is entitled to a far dower (*mahr al-miṭl*), which reflects her social status. The next issue is related to the time of the dower's payment. Jurists did not lay down specific rules; however, it was the Ottoman practice to make the

⁵ al-Ḥaṣḥafī, Muḥammad b. 'Alī. *al-Durr al-mukhtār šarḥ tanwīr al-abṣār*. In the margin of Muḥammad Amīn, known as Ibn 'Ābidīn. *Radd al-muḥtār 'alā al-durr al-muḥtār*. 5 vols., Būlāq, 1905-8, Vol. V, p. 425-426.

⁶ Imber, Colin. *Ebu's-su'ud: The Islamic Legal Tradition*. Stanford, Edinburgh University Press, 1997, p. 178-184; Gerber, Haim. *State, Society, and Law in Islam*. New York, SUNY Press, 1994, 62-79.

⁷ Kohlberg, Etan. "The Position of *Walad Zinā* in Imāmī Shī'ism". *BSOAS*, 2 (1985), p. 237-266, especially 249-253.

payment of the advance dower obligatory upon completion of the contract whereas the rest was paid upon death or divorce.

Ḥanafī marriage was a fragile institution. A husband has an unrestricted right to repudiate his wife, and to make vows, which, if he breaks them resulted in divorce. Furthermore, apostasy of either of the spouses had the same effect. In repudiating his wife a man may declare the divorce to be either revocable (*rağʿī*) or irrevocable (*bāʿin*).⁸ An irrevocable divorce is effective the moment he pronounces the formula. The divorced wife may not, however, remarry until she has completed a waiting period (*ʿiddah*) of three menstrual circles from the time of the divorce; or four months and ten days from the death of the husband; or, if in case of pregnancy, until the delivery of the child. Marriage within the waiting period is invalid. Moreover, Ebussuud makes it a criminal offence. If the husband pronounces a revocable divorce, the repudiation does not become effective until the completion of the waiting period. During this time, the marriage is still in existence. The renewal of the marriage is imperative in this case. Marriage should also be renewed, if the husband becomes Muslim. In case the wife converts to Islam, she is automatically divorced unless the husband accepts to convert as well.

If the husband pronounced the divorce formula three times or on a single occasion, the couple cannot remarry until the ex-wife has contracted, consummated and been divorced from an intermediate marriage (*taḥlīl*).⁹ Undoubtedly the function of the intermediate marriage was to deter husbands from carelessly pronouncing the triple divorce since he would have to endure the shame of knowing that his wife had intercourse with another man, if he wished to remarry her. On the other hand a woman's right to end a marriage was extremely limited. If she finds out that the husband has a hideously deforming disease or if he is impotent on the first night, the judge grants the husband a year's delay and the couple is divorced only if the husband does not consummate the marriage within this period.¹⁰ Additionally, the woman has the right to repudiate her husband on the attainment of puberty. To use the "option of puberty" (*ḥiyār al-bulūğ*) she would have to produce witnesses on the very first appearance of the menstrual

⁸ S.v. « Umm al-Walad » (Joseph Schacht), *ET*², CD version.

⁹ Heyd, Uryel. *Studies in Old Ottoman Criminal Law*. Oxford, Clarendon, 1973, p. 99-101.

¹⁰ Tucker. *In the House of the Law*. Id. "Marriage and Family in Nablus". 165-179.

blood, otherwise her right lapses. The other option a woman has—and it is extensively used—is the *ḥulʿ* (Turkish: *hul*) divorce, whereby a wife asks her husband for a divorce and the husband repudiates her for a consideration. This transaction, in legal theory, is “an exchange of property for the person”.¹¹ The amount that the wife has to pay is negotiable, but the usual understanding is that she would renounce all or some of her dower and maintenance. Finally there are the conditional divorces when the husband pronounces a vow like “If I do X, my wife is divorced”.¹² The divorce occurs automatically upon fulfilment of the vow. In many cases, husbands who were departing for distant and dangerous trips would pronounce this type of divorce to allow the wife to remarry without an investigation about his fate and a waiting period.

These rules on marriage and divorce were applicable to non-Muslims too, as *zimmi* (Arabic: *ḍimmi*) in the Ḥanafī interpretation of law are equal in practically the whole of the law of property and of contracts and obligations. Even in penal law, the non-Muslim is protected to the same extent as the Muslim. Following the Ḥanafī tradition there are special chapters on family affairs of non-Muslims appear in *fatva* collections. The majority of the cases discusses marriages of non-Muslims and newly converts to Islam. The extensive islamization has created social problems reflected in the *fatvas*.

Question: Zeyd a Jew has taken Zeyneb as second wife. She is the sister of his first wife Hind. After the union was consummated can Zeyneb be separated from him, if Zeyd becomes Muslim?

Answer: Yes.

The problem in this case is the affiliation between spouses. According to Islamic law, one cannot marry an immediate relative of his wife. The same opinion is offered, if the husband is a Christian.¹³

The marriage bond between non-Muslims is not broken even if their legal status, change.

¹¹ Pierce. “She is Trouble”. 269-301.

¹² Imber. *Ebu’s-Su’ud*. 192.

¹³ ‘Behcetü’l-fetava’. Istanbul, 1679, 73.

Question: Enemy Zeyd an inhabitant of an area in the Abode of War and his wife Hind are taken together to the Abode of Islam. If Muslim Bekr comes of possession of Zeyd and Muslim Beşr of Hind, is their marriage annulled?

Answer: No. (Ibid).¹⁴

The change in their legal status—from that of free people to slaves—does not necessarily annul the obligations among them, including the marriage one. In the same line of thought Muslim jurists were asked to comment on divorce between non-Muslims.¹⁵

Question: Zeyd a non-Muslim (*zimmi*) divorced his Christian wife Hind (*naşraniye*) with an irrevocable divorce (*üç talâq*). If the Muslim judge (*kadı*) is informed that they still live as husband and wife, is it imperative to separate them?

Answer: Yes.

The point of this legal opinion is that a couple opting for a Muslim divorce must follow the rules. An intermediate marriage is required to be able to marry again. It is interesting that the judge has a moral and administrative responsibility to take action, in case of transgression of the rules. It is however stressed that Ottoman law could apply only if the two parties consent to recognize the authority of the *kadı*.

Question: Because it is allowed in the religion of the Jewish group (*tâ'ife*) to marry the daughter of one's wife, Zeyd married Hind, a Jew, and the daughter of his wife. Is it permissible to separate them, if both Zeyd and Hind have not agreed to go together to court?

Answer: No.¹⁶

Bearing in mind the difficulty a Jewish woman had to get a divorce resorting to the Muslim court might have allowed her to regain her freedom. Rabbis in their *responsa* constantly complain about the interference to family affairs.

¹⁴ 'Behcetü'l-fetava'. Istanbul, 1679, 73.

¹⁵ 'Neticetü'l-fetava?', (manuscript 1688). F. 62.

¹⁶ Ali Çatalcalı. 'Fetava', (manuscript 1692). F. 32.

Complications occurred when spouses changed their legal status by converting to Islam. Conversion by force is strictly forbidden in Ottoman jurisprudence.¹⁷

Question: A *zimmi* Zeyd has accepted to become Muslim. Can he use force (*cebiri olunur*) on his adult Christian wife Hind and tell her “you should as well become Muslim”?

Answer: No. (Behcetü'l-Fetava 64.)

The *fetva* is complemented by another question:

Question: Additionally, is Zeyd permitted to forbid Hind from giving herself to the *zimmi* Amr and becoming his wife?

Answer: No.

If the husband converts to Islam, a renewal of marriage is recommended but not compulsory. The principle that even if a Christian is married to a Muslim, she legally remains part of her own community is reflected in the follow-up *fetva*. The following *fetva* though shows that custom or local practices might be different.¹⁸

Question: If Zeyd the Muslim husband of the Christian Hind dies, is she allowed after the end of her waiting period to marry the *zimmi* Amr?

Answer: Yes.

The ecclesiastical authorities imposed canonical punishments to those opting for Muslim marriages. However after their repentance was complete, they are again active parts of their community.

Going back to the issue of renewal of marital vows Ali Çatalcalı Efendi a 17th century jurisconsult does not consider it imperative.¹⁹

Question: If the Christian Hind becomes Muslim and her husband the Christian Zeyd is invited and accepts to also become Muslim, can they still live as husband and wife without renewing their marital vows?

¹⁷ ‘Behcetü'l-fetava’. 64.

¹⁸ Ali Çatalcalı. 32.

¹⁹ Ali Çatalcalı. 25. See, also Abdürrahim Efendi. ‘Fetava’. 17.

Answer: Yes, they can (Ali Catalcali, 25). See, also Abdürrahim Efendi (17).

Conversion of one of the spouses in Islam becomes a rather complicated matter, if one of the spouses refuses to follow suit. In this case, if the wife has converted, the marriage should be dissolved, following Ḥanafī laws on equality.²⁰

Question: Hind, the Christian wife of the Christian Zeyd becomes Muslim. If later on Zeyd is invited to Islam but he declines, is Hind separated by him?

Answer: Yes.

The involvement of the Ottoman authorities and in particular of the *kadı* in divorce cases of converts is a reflection of the efforts of the sultan to regulate family affairs. Marriage and divorce in pure Ḥanafī law is based on the power of words. Even, if no one is present you can marry and especially divorce. However the state is concerned about legal complications arising from the personal freedom recognized in the *ṣeriat* on family matters. Therefore, the role of the *kadı* becomes significant in the process

Question: Hind the Christian wife of the Christian Zeyd accepted Islam. Zeyd however has not accepted the offer of the judge to become Muslim. While Zeyd is an unbeliever Hind had her three menstrual periods. Are they separated from one another?

Answer: No.²¹

In addition: If the judge has not proclaimed the separation on the basis of Zeyd's refusal to join Islam, and if Hind marries the Muslim Amr, is this marriage sound (*ṣaḥīḥ*)?

Answer: No.

In addition: If Zeyd becomes Muslim after Hind has married Amr can he still have the judge proclaim her divorced from Amr and live with her as husband and wife?

Answer: Yes.²²

²⁰ Ali Çatalcali. 25.

²¹ 'Behcetü'l-fetava'. 65. See, also Abdürrahim Efendi. 'Fetava'. 14.

²² Abdürrahim Efendi. 'Fetava'. 14.

It is imperative thus to judicially determine the accepted period of consideration offered to prospective converts. According to jurists a period of three days is not endangering the validity of previously conducted marriage.²³

Question: Hind the Christian wife of the *zimmi* Zeyd after becoming Muslim, she invited Zeyd to Islam. Zeyd says “let’s see, let’s consider it further”. If Hind has not been separated from Zeyd and if within three days he accepts to become Muslim, is their previous marriage permanent or would they be forced to marry again?

Answer: It is permanent.

The period of three days is the canonical period used for other cases. For example, the apostate is given the same amount of time to reconsider. Within the limitations of procedural law, the jurist is eager to accept the couple in Islam with the least possible inconvenience.

Even if the new Muslim woman were to marry a Muslim and integrate herself into her new community, she would have to validate her actions in the Muslim court. This apparent violation of Islamic rules seems to be a deterrent to those women inspiring of becoming Muslim for the wrong reason, i.e. to escape from a violent or incompetent husband. Even if the husband is missing and unable thus to follow his wife in her new life as a Muslim, the jurist refuses to allow her to be separated from him.²⁴

Question: The *zimmi* Zeyd is missing in the Abode of Islam and his residence is not known. If his Christian wife becomes Muslim in his absence and he has not being offered to join Islam, and if his refusal is not legally established, can Hind become separated from Zeyd?

Answer: No.

The only case when the Muslim judge cannot intervene is when a female slave is married with her former owner’s consent. In this case the property right of the owner is more important than establishing authority.²⁵

²³ Ibid., 17.

²⁴ ‘Behcetü’l-fetava’. 64.

²⁵ Abdürrahim Efendi. ‘Fetava’. 16.

Question: The *zimmi* Zeyd sets free his female Christian slave Hind. If with Zeyd's permission she marries Amr can the *kadı* say 'I have not given my consent' and separate Hind from Amr?

Answer: No, he cannot.

The legal age to accept Islam—according to Ḥanafī jurisprudence—is when the person can comprehend the complexities of religion. In the following *fetva* this could be the age of nine.²⁶

Question: Zeyd is nine years old and he can comprehend religion. His underage Christian wife Hind accepted Islam. If Zeyd is invited to become Muslim but declines, can Hind be separated from him?

Answer: Yes.

As underage marriage is a customary practice, Ottoman jurisprudence allows underage conversions and prescribes the same rules applying to adults. The importance of the male agnates is stressed in a *fetva*. If the father converts to Islam, should the son who owes submission to his father be ordered to become Muslim? The answer of the jurist is positive. This last ruling,—although an interesting one—was not widely practiced. The Muslim court records are abundant of examples of Christian fathers continuing their relation to their newly converted offspring.

The dower of non-Muslims is another area of interest for the ottoman jurists.²⁷

Question: The *zimmi* Zeyd married the Christian Hind. After the privacy period and the consummation of marriage, if Zeyd dies, can Hind still claim from his estate her appointed dower and her share of inheritance?

Answer: Yes.

The Christian wife of the deceased enjoys the same rights as a Muslim woman. Even if her dower was not designated in her marital contract she can still claim the minimum dower.

²⁶ 'Behcetü'l-fetava'. 64.

²⁷ Abdürrahim Efendi. 'Fetava'. 190.

Question: Zeyd a Jew married the Jewish Hind without declaring a dower. If after the consummation of marriage Zeyd dies, can Hind mutually appeal to the judge and receive the minimum dowry from his estate?

Answer: Yes.²⁸

The obligation of paying the *mahr* ceases upon conversion of one of the spouses to Islam.

Question: The *zimmi* Zeyd married the Christian Hind without a dower. In their religion, it is allowed to marry in this way. Then Hind accepted Islam and as Zeyd was invited to join her and he declined, they were divorced. Can Hind ask a dower from Zeyd?

Answer: No, she cannot.²⁹

Also

Question: The *zimmi* Zeyd married the Christian Hind without a dower. In their religion, it is allowed to marry in this fashion. Later on, Zeyd became Muslim. However, Hind did not accept Islam. If Zeyd repudiates Hind, can she receive anything in the form of dower?

Answer: No.³⁰

Even if they both accept to convert, the wife still cannot claim a dower after the death of her husband. She can only receive one, if the couple renews their marital vows. Since paying the dower is not an obligation on behalf of the husband, his heirs cannot be asked to pay either.

Question: The *zimmi* Zeyd was married without a dower to his Christian wife Hind. In their religion, it is allowed to marry without a dower. If after Zeyd became Muslim he died, can Hind claim her *mahr* from his heirs who inherited his estate?

Answer: According to the opinion of the Great Imam [Abu Hanifa], may he rest in peace, she cannot.³¹

²⁸ Abdürrahim Efendi. 'Fetava'. 190.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

Another important issue is the value of the dowry. If the amount has been agreed upon before, the jurist forbids payment in devaluated coinage.

Question: When the current value of a solid *guruş* was seventy *akces*, the *zimmi* Zeyd married Hind with a referred dowry of that much *akçe*. Then when the *akçe* was devaluated and one *guruş* was the value of two hundred *akçe*, Zeyd left this world and died. Is it permitted to give Hind these devaluated *akçes* although she had agreed on the value of solid *gurus*?

Answer: No, it is not.³²

The final issue for the Ottoman jurist was to ensure that unexpected complications, like the birth of a child without a clear lineage would be eliminated. He was thus persistent on the adherence of the laws related to the waiting period after divorce or death.

Question: Hind the Christian wife of the *zimmi* Zeyd after consummating her marriage became Muslim. Zeyd when invited to join her, he declined and they were divorced. Is Hind allowed to marry someone else before her waiting period expires?

Answer: No.

Question: Is Hind the Christian wife of the Muslim Zeyd who died, allowed to marry the *zimmi* Amr before her waiting period expires?

Answer: No.³³

In Crete, the marriage contracts between Christians or Christians and new Muslims follow in general terms the Ḥanafī prescriptions. The bride and the groom—either in person or through their representatives—come to court with their witnesses. It is difficult to explain the presence of the priest in the Muslim court as the representative of the Christian husband. Papa Yakumis represented Nikodemos in his marriage contract to the widow Ergina Amira, 27 November 1658 (Stavrīnides, d. 116).³⁴ The only plausible explanation might have been that there were impediments in the union

³² Abdürrahim Efendi. 'Fetava'. 190.

³³ Abdürrahim Efendi. 'Fetava'. 17.

³⁴ Stavrīnides, N. *Μεταφράσεις Τουρκικών Ιστορικών Εγγράφων αφορώντων εις την ιστορίαν της Κρήτης* [Translations of Turkish Historical Documents related to the history of Crete]. 5 vols., 1972-85, vol. II, (T.A.H.), doc. 116.

of the two in church. The defiance to ecclesiastical rules exhibited by the priest could be a result of ignorance or necessity. As we see, further on the registration of marriage served as evidence against future claims.

The husband declares himself married to the woman, who accepts the statement. Then the referred dowry is stated. The value of the dowry differs, however the general trend is to offer lower rates than those in marriage contracts between two Muslims. Apart from religion, virginity was valued higher. In two marriage contracts between Christians registered on 23 September 1657, the virgin Yakumina got three times more than the non-virgin Kali.³⁵

The agreement of the bride to the marriage is imperative. Maria daughter of Konstandin on 20 January 1658 testified in court that Hasan son of 'Abdüllāh—a possible new convert—wished to marry her. She made it plain though that this is against her will and asked a *hüccet* (Arabic: *huğğah*) from the judge forbidding this marriage. The judge agreed to give her a certificate, since marriage without consent is illegal. This woman is presumably an adult and defends herself successfully in the Muslim court a mere decade after the Ottoman conquest, is an excellent example of adaptation to the new legal system.³⁶

The best example of the integration of Christians in Crete in the newly established Ottoman legal system is the case of a Christian mother who petitioned to the Sultan and obtained an imperial order to annul the marriage of her underage daughter to a Muslim member of the military elite. On 19 December 1651—six years after the Ottoman conquest—the Sultan ordered the *kadı* of Resmo to examine the petition of a Christian woman Maryeta of Kasteli village. She claimed that the military officer Mehmet the *sipahi* of the village took her daughter Andrina as his wife. According to Maryeta's words, Andrina "is underage. I am her legal guardian and I do not consent to this marriage". Maryeta contested the registration of the marriage in the court records and asked for a re-consideration. Upon her request, the sultan ordered his local commander to appoint an officer (*mübaşir*) who would summon to court the interested parties, their representatives and the witnesses of the disputed marriage contract. The judge is instructed to reevaluate the case and decide according to Islamic law.³⁷

³⁵ T.A.H., d. 9, 10.

³⁶ Ibid., d. 33.

³⁷ Resmo *Kadi Sicilleri*, (RKS) *Vakıflar Genel Müdürlüğü*, defter 56/d. 979.

The insistence of Ebussuud to impose a registration of the marriage contract in the Muslim court is testified to in Crete. In 1663 Mihalīs Magalīs from Lasithi came to court to receive a new copy of his marriage contract to the Christian Paraskevi. According to his statement, he lost the original contract. The judge requested the presence of the witnesses to his marriage, to verify that the two were married before and he then proceeded in the issuing of the new contract.³⁸

A child born in wedlock is entitled to parental inheritance. In Islamic law with concubinage, illegitimacy was almost impossible. However, in Christian marriages a child born thus is considered the product of fornication. The brother of the deceased Andrea, Nicolo Komita managed to reclaim all his property from Kali who when asked about her relation to the late Andrea admitted that she was a kept woman who bore him a son. The judge after investigating the case confirmed that the child was a product of fornication and deprived him from his inheritance rights.³⁹

The Ottoman military officials were also involved in the marital affairs of non-Muslims. Their concern about public morality and perhaps a consideration for the loss of fines imposed on unregistered marriages were behind the initiation of a court case by the *voyvoda* Hüseyin Ağa. In 1658 he took to court two Armenians, Aneta and her baker husband Astur accusing them of being married illegally. In her statement, Aneta revealed a social problem. Her previous husband another Armenian, Murat, abandoned her with a son. He had procured a debt and as he was unable to pay, he escaped in Egypt. Aneta made it clear that she had no other option than marrying again, and added that the representative of the judge Osman Efendi was asked about it and allowed the second marriage. (Stavrīnides, d. 46).⁴⁰ A similar social problem lies behind the conversion of a Christian woman. In a rare instance, the judge added after the conversion entry that Sofia became Ayşe along with her minor son, because “her cursed husband was not working and as he had no means to live on, he sold his children and vanished”. This entry is registered fifteen days after the imperial order prohibiting such actions.⁴¹

There is yet another interesting aspect of mixed marriages between Muslim and new converts. The admittance into another social group does not

³⁸ T.A.H., d. 199.

³⁹ RKS, 57/316.

⁴⁰ T.A.H., d. 46.

⁴¹ T.A.H., d. 185.

necessarily alter communal customs and long-lived habits. On 14 April 1671, a Christian resident in Kandiye, Ergina daughter of Yanis sold to her newly Muslim husband Mustafa Bese a field of 25 olive trees. Among spouses buying and selling property is a usual practice.⁴² However, Ergina also states that after Mustafa accepted the price of 25 gurus, she gave the sale price as a gift, *hibe* (Arabic: *hibah*) to her husband to use as he wishes. As their marriage contract was registered two days earlier, 12 April 1671⁴³ it seems that the gift was a way to legitimize in an Islamic way the Christian custom of dowry. Islamic law could only allow the exchange of nuptial gifts between spouses.⁴⁴

Divorce in the Muslim courts of Crete is in accordance to Ottoman jurisprudence. There are many cases of the triple irrevocable divorce⁴⁵ and the *hul* divorce. The judge demands the waiting period to be observed after the divorce between a Christian and—as the document states—a new convert. The judge's addition of a well-known rule of Islamic divorce reflects his doubt on the legal knowledge of converts.⁴⁶ Normally in a divorce initiated by the wife (*hul*) she is expected to give up her dowry and maintenance during her waiting period,⁴⁷ however the agreement is negotiable. In an interesting entry dated 1 July 1658 Ergina asked and got a divorce from her husband Mehmet Bese. She gave away the 20 gurus of her dowry and her maintenance. However, she received from Mehmet Bese a gift she had made to her husband on their wedding day. Based on this entry, it seems that our observation about the disguise of Christian dowry under the *hibe* system was in practice. If the aforementioned items were, her own private property there would be no need to register them in court and the acceptance of the husband would not be necessary.

As divorce in Islamic law could occur accidentally there are many entries related to former husbands who refuse to acknowledge separation. Margarita acting as representative of her daughter Ayşe (a new convert) complained in court that the former husband Hasan still insists on having marital relations with her, although he divorced Ayşe three days earlier

⁴² RKS, 56/647.

⁴³ T.A.H. 2/122.

⁴⁴ For a gift to the husband, see also, RSK, 56/125.

⁴⁵ RSK, 57/454.

⁴⁶ T.A.H., d. 72.

⁴⁷ T.A.H., d. 182.

with an irrevocable divorce. Upon his denial, the Christian woman produced two Muslim witnesses and won her case.⁴⁸

In the final case, the complexity of divorce and the ability of Christians to make use of the legal system is apparent. In October 1671, Maryeta daughter of Damianos, a Christian accused her husband Cafer Bey that although legally divorced he still demands marital relations. In her statement, she said "Two years ago I was the wife of Cafer Bey and I became ill. He told me 'Buy me a slave, in my name, give her as gift to me and I will divorce you'. I bought for 150 *aslan gurus*, a female slave and he divorced me. Although we are divorced he still has intercourse with me. I ask that he is questioned and forbidden from continuing to harass me". When he declined, she produced four Muslim witnesses who affirmed her story. The judge accepted their testimony and ordered Cafer Bey not to disturb Maryeta anymore.⁴⁹

There are many interesting remarks with regard to the application of Ottoman law in Crete. The general principles of *Ḥanafī* law on marriage and divorce are followed and the Ottoman modifications stressing the judicial and sultanic authority are observed. The registration of marriage contracts is considered an important if not necessary requirement. The aim was to alleviate complications in case of divorce or death of one of the spouses. Ergene recently has challenged the power of written documents in Ottoman courts. He is correct in the sense that witnesses still are the most significant factor in determining success in the Ottoman court; however, this is merely an adherence to Islamic law of procedure. The petition to the judge to reissue a marriage contract was a practical necessity, an example of which is the order of the judge to produce the marriage contract, as proof. This does not mean though that practice was similar everywhere in the empire. Societies like the Cretan one with a long tradition of written documentation, inherited by the Venetians, was more apt to adopt Ottoman innovations on registration than towns in Anatolia.

Christians and new Muslims in Crete seem to have adapted rather rapidly to the introduction of the new judicial system. They can defend themselves successfully in court and they are aware of procedure. It is remarkable to see a Christian woman achieving the rehearing of her case through a sultanic order few years after the conquest. I cannot however but wonder about the type of legal advice and aid she had received local customs like the

⁴⁸ T.A.H., d. 434.

⁴⁹ T.A.H., d. 487.

traditional dowry given by the wife to the husband, is thus disguised, as gift to adhere to new legal concepts. Social problems like poverty, forced conversion or second marriages, illustrate the problems the judge was faced with. Thus the ottoman judge uncertain as to whether the rapidly changing Cretan society, with the numerous converts and non-Muslims is capable of understanding fine points of Islamic law, operates as an educator reminding the litigants of their obligations.